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LING CHI TUNG & ORS v. TIA POH LOONG

HIGH COURT MALAYA, JOHOR BAHRU
SABIRIN JA'AFAR JC
[CIVIL APPEALS NO: 12BNCVC-12-04-2014
& 12BNCVC-13-04-2014]
B 16 NOVEMBER 2014

CONTRACT: *Construction of terms of contract – Conditional contract – Insertion of words 'subject to contract' – Whether amounted to additional condition – Whether identity of parties, property, price and terms ascertained with clarity –*
C *Whether there was concluded contract between parties*

The appellants ('defendants') were the registered proprietors of the property which the respondent ('plaintiff') sought to purchase. The plaintiff signed a sale and purchase agreement ('SPA') and forwarded a deposit of RM75,000 for the said property ('property 1') to the defendants. Subsequently, the
D defendants returned the SPA, unexecuted, to the plaintiff together with a cheque of RM65,000. As a result of the breach by the defendants under the SPA, the plaintiff claimed, *inter alia*, damages in the sum of RM75,000 and the refund of RM10,000. The defendants contended that the plaintiff had agreed to purchase property 1 together with another property ('property 2')
E at a total price of RM1,300,000. The defendants alleged that the plaintiff had imposed the conditions that the sale of property 1 was subject to a contract with a purpose of releasing himself from purchasing both properties together. The defendants contended that due to the conditions imposed and the unexecuted SPA, the plaintiff's claim was rendered baseless. The issue that
F arose for the court's determination was whether 'subject to contract' and unexecuted SPA rendered the relevant contract non-binding on the defendants. The Sessions Court Judge allowed the plaintiff's claim and hence the present appeal by the defendants.

Held (dismissing appeal with costs):

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(1) The identity of the parties, the property and the price and the terms had been ascertained with clarity. Over and above the certainties, the plaintiff had executed the SPA and paid the deposit. Hence, notwithstanding the term 'subject to contract' and the unexecuted agreement by the defendants, there was a concluded contract between
H the plaintiff and the defendants. Therefore, the insertion of 'subject to contract' would not tantamount to an additional condition imposed by the plaintiff on the sale of property 1. (para 14)

(2) Since the SPA was binding and valid, pursuant to cl. 2, it was provided
I that upon paying the deposit the plaintiff agreed to buy the property. Therefore, the defendants' refusal to sell the property had caused a breach of cl. 2 and in the circumstances, cl. 19 on 'Default By The Vendor' shall be invoked against the defendants. (para 14)

(3) The defendants had failed to prove that the condition of selling property 1 and property 2 together had existed when the parties entered into the transactions. Even if the said conditions were to so exist, there was no evidence to show that the plaintiff had refused to purchase either of the properties. The plaintiff had executed the agreement and paid the deposit for the sale of both properties. Hence, the alleged breaches of the plaintiff as contended by the defendants was not only unsubstantiated but was also insufficient to justify repudiation of the contract by the defendants. (paras 18 & 19)

Case(s) referred to:
Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises [1994] 3 CLJ 133 SC ***(foll)***
Cipta Cermat Sdn Bhd v. Perbadanan Kemajuan Negeri Kedah [2007] 1 CLJ 498 CA ***(foll)***
Karthiyayani & Anor v. Lee Leong Sin & Anor [1974] 1 LNS 61 FC ***(foll)***
Sandrifarm Sdn Bhd v. Pegawai Pemegang Harta Malaysia [2000] 3 CLJ 313 CA ***(foll)***
Setapak Heights Development Sdn Bhd v. Tekno Kota Sdn Bhd [2006] 2 CLJ 337 CA ***(foll)***
Sim Ah Hee @ Lim Ah Hee & Anor v. Affin Bank Bhd [2010] 1 LNS 1913 CA ***(foll)***

Legislation referred to:
Evidence Act 1950, s. 103

For the appellant/defendant - CT Lee; M/s Ros Lee & Co
For the respondent/plaintiff - WL Shin; M/s Tia & Noordin

[Appeal from Session Court, Johor Bahru; Suit No: A52-405-06-2013]

Reported by S Barathi

JUDGMENT

Sabirin Ja'afar JC:

[1] Will 'subject to contract' and unexecuted sale and purchase agreement render the relevant contract non-binding on the defendants? This is the only issued forwarded to this court for determination in the appeal.

[2] For the ease of reference, this court hereby refer the appellants as the defendants and the respondents as the plaintiff.

[3] The appeal is in respect of the Civil Appeal No. 12BNCVC-12-04-2014. The other Appeal No. 12BNCVC-13-04-2014 was withdrawn by the plaintiff's solicitors when it came up for hearing.

Undisputed Facts

[4] The defendants are registered proprietors of a property held under HS(D) 294453 PTD 70471 Mukim Tebrau, District of Johor Bahru, State of Johor, of which its address is No. 19 & 19A, Jalan Impian Emas 2, Taman Impian Emas, 81300 Skudai, Johor ("property 1").

[5] In buying property 1, the plaintiff had signed a sale & purchase agreement which, *inter alia*, contained the purchase price of RM750,000. Upon forwarding the said agreement to the defendants' solicitors on 24 April 2013, the plaintiff had paid a deposit in total of RM75,000.

Plaintiff's Case

[6] After forwarding the deposit and the agreement signed by the plaintiff, there was no response from the defendants, so the plaintiff's solicitors sent out several reminder letters to the defendants' solicitors on the said agreement. On 23 May 2013, the defendants' solicitors returned the said agreement, unexecuted, to the plaintiff's solicitors together with a cheque of RM65,000.

[7] As a result of the breach committed by the defendants under the said agreement, the plaintiff claimed for, *inter alia*, damages in a sum of RM75,000, refund of RM10,000 etc.

Defendants' Case

[8] The plaintiff had agreed to purchase property 1 together with another property held under HS(D) 11507 PTD 31996 Mukim of Pulai, District of Johor Bahru, State of Johor ("property 2") at a total price RM1,3000,000. Property 2 is at the address at No. 58, Jalan Layang 16, Taman Perling, 81300 Skudai, Johor and it is owned by one Ling Auto Parts & Accessories Supply Sdn Bhd.

[9] The plaintiff had imposed unreasonable conditions on the sale of property 1 with a purpose of releasing himself from purchasing both property 1 and property 2 together:

(a) the sale of property 1 is subject to contract; and

(b) the balance of 10% deposit (RM65,000) shall not be released to the defendants until July 2013.

[10] The plaintiff had not imposed the same conditions on the sale of property 2 and the plaintiff's earlier agreement of buying both properties together was to induce Ling Auto Parts to sell property 2 at a price of RM550,000, which was lower than market value.

[11] Since the plaintiff had imposed a condition that the sale of property 1 was subject to contract and without an executed sale & purchase agreement, the plaintiff's claim is therefore baseless.

Decision Of The Sessions Judge And Issues To Be Determined By This Court

[12] The learned Sessions Court Judge at pp. 280-283 appeal record explains her findings:

[3] Mahkamah mendapati dalam kes ini terdapat dua perjanjian jual beli secara berasingan yang telah disediakan untuk kedua-dua hartanah yang berlainan dengan harga jualan yang berlainan. Mahkamah merujuk kepada eksibit D19 dan eksibit D20. *Pada pandangan Mahkamah disebabkan dua perjanjian jual beli yang disediakan oleh peguam Plaintif dan peguam Defendan-Defendan maka hartanah yang ingin dijual oleh Defendan-Defendan adalah dua hartanah yang berasingan dengan harga yang berlainan iaitu masing-masingnya pada harga jualan RM750,000-00 dan RM550,000-00 dan bukannya secara bersama-sama dengan jumlah sebanyak RM1.3 juta*. Keterangan ini disokong oleh peguam Defendan-Defendan (SD5) yang dalam keterangannya di Mahkamah mengesahkan bahawa perjanjian jual beli disediakan secara berasingan dan kedua-dua hartanah ini tidak dijual secara bersama-sama untuk harga RM1.3 juta.

[4] Dalam urusan jual beli hartanah tersebut Defendan-Defendan mengarahkan seorang agen hartanah bernama Wong Kam Keong (SD9) untuk menguruskannya. SD9 telah membuat akuan sumpah (eksibit 25) yang menyatakan jualan hartanah tersebut adalah secara bersama-sama dengan harga jualan RM1.3 juta. Namun demikian *setelah Mahkamah meneliti akuan sumpah SD9 (eksibit 25) Mahkamah mendapati akuan sumpah itu tidak teratur kerana tidak mematuhi undang-undang Akta Kanun 1950 kerana surat akuan tersebut tidak ditandatangani oleh SD9 dan juga tidak ditandatangani di hadapan Pesuruhjaya Sumpah. Walaupun dalam keterangan di Mahkamah SD9 menyatakan hartanah tersebut hendak dijual secara bersama-sama namun keterangan SD9 tidak disokong dalam mana-mana peruntukan perjanjian jual beli yang telah disediakan oleh peguam Plaintif dan peguam Defendan-Defendan. Oleh yang demikian Mahkamah tidak menerima keterangan SD9*.

[5] *Mahkamah mendapati Plaintif berniat untuk membeli kedua harta ini dan telahpun membayar wang deposit sebanyak 10% sebagaimana yang dikehendaki dalam peruntukan kedua-dua perjanjian jual beli tersebut*. Plaintif telah menandatangani perjanjian jual beli bagi kedua-dua hartanah tersebut atas alasan Plaintif perlu membeli kedua-dua hartanah ini dengan harga sebanyak RM1.3 juta dan dibeli secara bersama-sama. Mahkamah mendapati terma ini tidak dimasukkan dalam mana-mana peruntukan dalam perjanjian jual beli tersebut. Oleh yang demikian, *Mahkamah berpendapat Defendan-Defendan telah sengaja tidak mahu menandatangani kedua perjanjian jual beli tersebut. Defendan-Defendan juga tidak berhasrat untuk menyempurnakan kontrak jual beli tersebut dan dengan ini sengaja membatalkan dan menamatkan perjanjian jual beli tersebut*.

[6] Pada pendapat Mahkamah Defendan-Defendan telah melanggar kontrak perjanjian jual beli kerana tidak menyempurnakan perjanjian jual beli serta bertindak membatalkan atau menamatkan perjanjian tersebut dengan tidak menandatangani perjanjian tersebut dan dengan ini *Plaintif berhak kepada gantirugi perlanggaran kontrak walaupun Defendan-Defendan mempertikaikan tentang perkataan 'Subject to contract' dalam surat menyurat bagi urusan jual beli hartanah tersebut. Mahkamah mendapati Plaintif telah melaksanakan niatnya dan tanggungjawabnya untuk membeli kedua-dua hartanah tersebut dengan menandatangani perjanjian jual beli dan telah membayar deposit bagi kedua harta tersebut*. Akibat daripada perlanggaran kontrak di

A pihak Defendan-Defendan Mahkamah membenarkan tuntutan Plaintif untuk wang gantirugi sebanyak RM75,000-00 dan memulangkan RM10,000.00 untuk hartanah di Taman Impian Emas.

[7] *Mahkamah menolak tuntutan Plaintif bagi relief pelaksanaan bagi hartanah Taman Perling, Johor disebabkan perjanjian jual beli bagi hartanah ini belum* B *disempurnakan oleh Defendan-Defendan dan Plaintif hanya membayar wang deposit yang akan dikembalikan dan baki harga jualan hartanah di Taman Perling ini belum dijelaskan sepenuhnya oleh Plaintif.* (emphasis added)

Whether 'Subject To Contract' And Unexecuted Sale & Purchase Agreement Render The Relevant Contract Non-binding On The Defendants?

C **[13]** This court was asked by the plaintiff's counsel to consider the authorities below in support of his argument:

(a) In *Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises* [1994] 3 CLJ 133; [1994] 2 MLJ 754, Edgar Joseph Jr SCJ held as follows:

D But it is now well settled that when an arrangement is made "subject to contract" (see *Rossdale v. Denny*) or "subject to the preparation and approval of a formal contract" (see *Winn v. Bull*) and similar expressions, it will generally be construed to mean that the parties are still in a state of negotiation and do not intend to be bound unless and until a formal contract is exchanged.

E We say "generally" because in exceptional circumstances, the "subject to contract" formula will not be so intractable as always and necessarily to prevent the formation of a contract.

True it is that merely because the parties contemplate the preparation of a formal contract, that by itself will not prevent a F binding contract from coming into existence before the formal contract is signed." (emphasis added)

(b) In *Sandrifarm Sdn Bhd v. Pegawai Pemegang Harta Malaysia* [2000] 3 CLJ 313; [2000] 2 MLJ 535, the Court of Appeal had decided as follows:

G Held, allowing the appeal:

(1) A valid enforceable contract had materialised between the parties.

The offer to sell was made by the respondent and this offer was accepted by the appellant. In accordance with the terms of the H sale, the appellant remitted the 10% deposit amounting to RM190,000-00 which amount was duly received by the respondent and they issued receipt for it. The parties, the property, the price and the terms had been identified with sufficient certainty. Such an agreement is enforceable as if it was embodied in a sale and purchase agreement (see p 538E-G); I *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1996] 3 MLJ followed.[1] (emphasis added)

(c) In *Cipta Cermat Sdn Bhd v. Perbadanan Kemajuan Negeri Kedah* [2007] 1 CLJ 498; [2007] 2 MLJ 746, Gopal Sri Ram JCA (as His Lordship then was) held as follows:

> [7] Let me take the first issue. Learned counsel for the plaintiff argued that there was a concluded contract. He submitted that the parties were *ad idem* without the need of a more formal sale and purchase agreement. The defendant's case is that there was no binding contract because the formal agreement had not been signed by both sides. I agree with the plaintiff's submission. I think there was a concluded contract despite the want of a duly executed formal agreement. Just look at the facts. You have an offer by the defendant. You have the acceptance by the plaintiff. And you have consideration. You also have certainty of the parties, certainty of price and certainty of the property. And you have the unequivocal acts of parts performance by the plaintiff which are referable to an existing contract between the parties (see *Steadman v. Steadman* [1974] 2 All ER 977).
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> [9] The acts of part performance in the present case are the payment of the deposit coupled with the RM5,000-00 meant for the squatters. Based on the authorities, there was a concluded contract in this case (see *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1996] 3 MLJ 327). True that no formal contract of sale and purchase was ever executed. But that does not matter. There can be a concluded contract even where the parties contemplate the execution of a more formal document. (emphasis added)

[14] This court had examined all facts forwarded by both plaintiff and defendant and found that:

(a) There is no dispute that in our instant case, identity of the parties, the property, the price and the terms had been ascertained with clarity. Over and above such certainty, the plaintiff had in fact executed the sale & purchase agreement (exh. D19) and paid the deposit. Therefore, following the authorities cited above, notwithstanding the term 'subject to contract' and the unexecuted agreement by the defendants, there was a concluded contract between the plaintiff and the defendants. Therefore, the insertion of 'subject to contract' would not tantamount to an additional condition imposed by the plaintiff on the sale of property 1 as contended by the defendants.

(b) Since D19 is binding and valid, pursuant to cl. 2 thereof, it is provided that upon paying the deposit, the vendor (ie, the plaintiff) agrees to buy the property. As such, the defendants' refusal to sell the property has caused a breach of cl. 2 and therefore cl. 19 on default by the vendor shall be invoked against the defendants.

A *Whether The Condition Of Property 1 And Property 2 Being Sold Together At A Price Of RM1,300,000 Existed?*

[15] Burden of proof:

(a) Pursuant to s. 103 of the Evidence Act 1950,

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> 103 Burden of proof as to particular fact
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> The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person

C **[16]** Sale and Purchase Agreement (D19)

(a) Based on evidence adduced in the trial, the sequence of events relevant to D19 are as follows:

(i) through a letter dated 20 March 2013, the defendants' solicitors forwarded the draft sale and purchase agreement to the plaintiff's solicitors;

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(ii) through a letter dated 9 April 2013, the plaintiff's solicitors reverted with some proposed amendments on the draft sale and purchase agreement;

E (iii) through a letter dated 19 April 2013, the defendants' solicitors forwarded five fair copies of sale & purchase agreement (D19) to the plaintiff's solicitors; and

(iv) through a letter dated 23 April 2013, the plaintiff's solicitors forwarded to the defendants' solicitors the deposit together with five

F copies of D19 executed by the plaintiff.

Hence, it is clear to this court that D19 had been finalised between both parties and forwarded to the plaintiff for his execution. As such, following the authorities below, this contract shall be interpreted within its four corners to give effect to the intention of the parties:

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(i) *Sim Ah Hee @ Lim Ah Hee & Anor v. Affin Bank Bhd* [2010] 1 LNS 1913; [2010] 5 MLJ 1, the Court of Appeal held that

> [14] In short, the question to be asked is the meaning of what the parties have said and not what they mean to say. In other words, if the contract is reduced into a document
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> H it must be read within its four corners.[2]

(ii) In *Setapak Heights Development Sdn Bhd v. Tekno Kota Sdn Bhd* [2006] 2 CLJ 337; [2006] 3 MLJ 131, the Court of Appeal decided that

> [27] It is commonplace that it is the duty of the court to give effect to the clear intention of the parties as expressed in Clause 5(b) of the agreement which is in clear, unambiguous and unmistakable language. In the *Central*
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Bank of India Ltd, Amritsar v. Hartford Fire Insurance Co Ltd AIR 1965 SC 1288, it was held that:

> Not it is commonplace that *it is the court's duty to give effect to the bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however much it may dislike the result*.
> (emphasis added)

In *Karthiyayani & Anor v. Lee Leong Sin & Anor* [1974] 1 LNS 61; [1975] 1 MLJ 119, Federal Court held as follows:

> It is settled law that a person cannot corroborate himself but it would Appear that section 157 of the evidence Act enables a person to corroborate his testimony by his previous statement ... in my opinion the nature and extent of the corroboration necessary in such a case must depend on and vary according to the particular circumstances of each case ... A witness is normally to be considered independent unless he springs from sources which are likely to be tainted. If they are circumstances tending to affect his impartiality, such circumstances will have to be taken into account and the court will have to come to a decision having regard to such circumstances. The court must examine the evidence given by such witness very careful and scrutinise all the infirmities in that evidence before deciding to act upon it[3]

Conclusion

[17] In this case, the plaintiff has, on balance of probabilities, proved his claims against the defendants with the evidence of the sale and purchase agreement (D19) signed by him, the payment of the deposit and several reminder letters sent to the defendants' solicitors. Thereafter, the burden of proof is shifted to the defendants to prove the defence.

[18] Based on my submission above, the said agreement (D19) is valid and binding on the parties, and after considering all the evidence adduced by the defendants against the gaps of unresolved doubts arisen from their very own evidence, I respectfully submit that the defendants have failed to prove that the condition of selling property 1 and property 2 together had existed when the parties entered into the transactions.

[19] In any event, even if the said conditions were to so exist, there is no evidence to show that the plaintiff had refused to purchase either of the properties. In fact, it is undisputed that the plaintiff had executed the agreement and paid the deposit for the sale of both properties. Hence, the alleged breaches of the plaintiff as contended by the defendants is not just unsubstantiated but also insufficient to justify repudiation of the contract by the defendants.

A **[20]** The essence of this case is premised on the interpretation of D19 to ascertain the intention of the parties. To quote the judgment of Edgar Joseph Jr SCJ in the case of *Ayer Hitam Tin Dredging Malaysia Bhd (supra)*:

> In other words in its task of ascertaining the intention of the parties, the court will generally speaking, apply an objective test; more particularly it
B will ask itself, what would the intention of reasonable men be if they were in the shoes of the parties to the alleged contract.

[21] Based on the reasons above stated, it is the view of this court that the learned Sessions Court Judge's decision was right in allowing the plaintiff's claims and the appeal is hereby dismissed with costs.

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